Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	EB Docket No. 03-96
	)	
NOS COMMUNICATIONS, INC.,	)	File No. EB-02-TC-119
AFFINITY NETWORK INCORPORATED and	)	
NOSVA LIMITED PARTNERSHIP	)	NAL/Acct. No. 20033217003
	)	
Order to Show Cause and Notice	)	FRN: 0004942538
of Opportunity for Hearing	)	

PETITION FOR RECONSIDERATION

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May 7, 2003

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SUMMARY

NOS Communications, Inc., Affinity Network Incorporated, and NOSVA Limited Partnership (collectively the "Companies") request the Commission to reconsider and amend the *Order to Show Cause and Notice of Opportunity for Hearing* ("*Order*") in this proceeding so that: (1) the Companies are named as respondents; (2) the show cause order issued under §§ 4(i) and 214 of the Communications Act ("Act") is vacated; (3) the show cause order issued under § 312(b) of the Act is amended to direct the Companies to show cause under § 205(a) of the Act; (4) issue (b) is deleted and issue (c) is amended; and (5) the notice of opportunity for hearing under § 503(b)(A) of the Act is vacated.

The Companies stand accused under the *Order* of violating § 201(b) of the Act by engaging in a misleading and continuous telemarketing campaign. Yet, the *Order* is directed at the unidentified principals of the Companies. The Companies' principals have been ordered to show cause why: (1) the Companies' operating authority under § 214 of the Act should not be revoked; and (2) an order should not be issued directing them to cease and desist providing common carriers services without the Commission's consent. In order to avail themselves of the opportunity to be heard, the Companies' principals must file a notice stating that "a principal or other legal representative" from the Companies will appear at the hearing.

Although they are subject to the Commission's Title II jurisdiction, and have been charged with violating § 201(b), the Companies were not ordered to show cause. The Companies must be designated as the party respondents. In order to conform to the limits of its Title II jurisdiction, the Commission should proceed against the Companies alone and only pursuant to § 205(a) of the Act.

Under § 558(b) of the Administrative Procedure Act ("APA"), the Commission must have an express grant of statutory authority to impose a sanction. Even assuming it has jurisdiction to

regulate telemarketing as a common carrier practice under § 201(b), the Commission clearly has no express authority to impose the sanctions it contemplates in this case.

The Commission claims §§ 4(i) and 214 of the Act as its authority to revoke the Companies' "blanket" 214 certification, but neither provision expressly authorizes it revoke a carrier's § 214 authority or to impose any other sanction for a carrier's wrongful conduct. Likewise, § 312(b) does not empower the Commission to proceed to order the Companies' principals to cease and desist from engaging in the lawful conduct of providing common carriers services without the Commission's consent. If the Commission wants to remedy a suspected § 201(b) violation by issuing a cease and desist order, the APA and the Act mandate that it follow the cease and desist procedure authorized for use specifically against Title II common carriers by § 205 of the Act.

The Commission did not identified the principals of the Companies whom it ordered to show cause and whose conduct it seeks to restrain. Nor did it articulate a legal theory under which it has express authority to enjoin the activities, and infringe the individual rights, of the principals of Title II common carriers. Nor could it, because no provision of the Act expressly empowers the Commission to enjoin a principal of a Title II carrier from pursuing a career in telecommunications.

The Commission effectively notified the Companies of a potential forfeiture liability if they are found to have willfully or repeatedly violated § 201(b) of the Act. However, a forfeiture penalty cannot be imposed for any conduct which is subject to forfeiture under Title II of the Act. Unjust and unreasonable telemarketing practices that violate § 201(b) - - if telemarketing is subject to § 201(b) - - are subject to forfeiture under, and only in accordance with, § 205(b) of the Act. Consequently, no forfeiture penalty can be assessed in this case.

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PETITION FOR RECONSIDERATION

NOS Communications, Inc., Affinity Network Incorporated, and NOSVA Limited Partnership (collectively the "Companies"), on behalf of their respective principals, and pursuant to § 405(a) of the Communications Act of 1934 ("Act") and § 1.106(a)(1) of the Commission's Rules ("Rules"), hereby petition the Commission to reconsider its *Order to Show Cause and Notice of Opportunity for Hearing* ("*Order*") in this proceeding. The Companies request that the *Order* be amended so that: (1) they are named as respondents; (2) the show cause order issued under §§ 4(i) and 214 of the Act is vacated; (3) the show cause order issued under § 312(b) of the Act is amended to direct them to show cause under § 205(a) of the Act; (4) issue (b) is deleted and issue (c) is amended; and (5) the notice of opportunity for hearing under § 503(b)(A) of the Act is vacated.

INTRODUCTION

The Companies are indeed "switchless resellers" of long-distance service. *Order*, at 2. They do operate as common carriers and are subject to Title II of the Act. *See id.* at 3. And they stand accused by the Commission of engaging in a "misleading and continuous telemarketing campaign" allegedly in violation of § 201(b) of the Act. *See id.* at 12. But the Companies have not been called upon to answer that charge.

The *Order* is quite clearly directed at the unidentified "principals" of the Companies, not the Companies themselves. The first ordering clause directs "the principal or principals" of NOS, ANI and NOSVA to show cause why the Companies' operating authority under § 214 of the Act should not be revoked. *Id.* (¶ 25). The second orders "the principal or principals" to show cause why an order should not be issued that directs them to cease and desist providing common carriers services without the Commission's consent. *Id.* at 14 (¶ 26). Finally, the fifth ordering clause provides that, to avail themselves of the opportunity to be heard at the show cause hearing, "the principal or principals" must file a written appearance stating that "a principal or other legal representative" from the Companies will appear at the hearing. *Id.* (¶ 28).

The *Order* explicitly makes the Enforcement Bureau a party to the hearing. *See id.* (¶ 28). Without explanation, the principals of the Companies have been afforded the rights of parties. But the Companies that are the carriers subject to the Commission's Title II jurisdiction, and are alleged to have violated § 201(b) of the Act, were not ordered to show cause. The Commission should designate the Companies as the party respondents, and remove the principals as parties.[1/]

The Companies ask the Commission to conform the *Order* to the metes and bounds of its Title II jurisdiction over nondominant interexchange carriers. The Commission should proceed against the Companies alone and only pursuant to § 205(a) of the Act.

STANDING

Section 405(a) of the Act provides, "After an order, decision, report, or action has been made

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1/ The confusing *Order* forced the Companies to file notices of appearance today that alternatively seek leave to intervene. The principals have filed a notice of their special appearance for the purpose of challenging the Commission's jurisdiction over them.

or taken in *any* proceeding by the Commission . . . *any* person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration . . . ." 47 U.S.C. § 405(a) (emphasis added). That unequivocal language confers on aggrieved parties "a statutory right to petition for reconsideration." *Fair Oaks Cellular Partners*, 10 FCC Rcd 9980, 9981 (1995). *See Southland Industries, Inc.* v. *FCC*, 99 F.2d 117, 121 (D.C. Cir. 1938). Obviously, the Companies' interests are adversely affected by the *Order* inasmuch as it charges them (although it does not make them party respondents) with unlawful conduct and threatens their authority to engage in interstate telecommunications. They here exercise their statutory right to seek reconsideration for the purposes of challenging the Commission's jurisdiction to proceed under the *Order* as issued.

RIPENESS

Section 1.106(a)(1) of the Rules provides that a petition for reconsideration of an "order designating a case for hearing" will be entertained if it "relates to an adverse ruling with respect to a petitioner's participation." 47 C.F.R. § 1.106(a)(1). The Commission's rulings on participation in the hearing were announced in the ordering clauses of its *Order*. *See id.* § 1.106(k)(3), Note. Those rulings were adverse to the Companies insofar as they were neither named as respondents to the show cause orders nor clearly identified as parties to the hearing. This petition relates to those rulings and must be entertained by the Commission.

The Companies challenge the Commission's jurisdiction to proceed against them, and in particular their principals, under §§ 4(i), 214 and 312(b) of the Act. *See Order*, at 13–15 (¶¶ 25, 26, 30, 32). That challenge is timely. Not only may the issue of subject matter jurisdiction be raised at any time, *see Rath Packing Co.* v. *Becker*, 530 F.2d 1295, 1303 (9th Cir. 1975), *aff'd*, 430 U.S.

519 (1977), but the Commission has entertained and granted a petition for reconsideration of a hearing designation order that challenged its jurisdiction to issue show cause and cease and desist orders. *See Westel Samoa, Inc.*, 13 FCC Rcd 6342, 6244-45 (1998).

DISCUSSION

The Commission set this matter for hearing to determine two issues. First, the Administrative Law Judge ("ALJ") is to decide whether the Companies willfully and repeatedly violated § 201(b) Act. *See Order*, at 14 (¶ 27(a)). If he finds a § 201(b) violation, the ALJ is to decide whether: (1) the Companies' "blanket" § 214 authority to operate as common carriers should be revoked; and (2) the Companies and/or their principals should be ordered to cease and desist from providing interstate common carrier service without prior Commission consent. *Id.* (¶ 27(b), (c)).

The ALJ also is to decide whether the Companies have "willfully or repeatedly violated *any* provision" of the Act or the Rules cited in the *Order*. *Id.* at15 (¶ 30) (emphasis added). If so, he is to determine if a forfeiture order should be issued pursuant to § 503(b) up to the statutory maximum of $1.2 million. *See id.*

The revocation of § 214 authority, the issuance of a cease and desist order, and the imposition of a forfeiture are all sanctions under the Administrative Procedure Act ("APA"). *See* 5 U.S.C. §551(10)(A), (C), (F), (G). The APA provides, "A sanction may not be imposed . . . except within jurisdiction delegated to the agency and as authorized by law." *Id.* § 558(b). Under APA § 558(b), the Commission must have express grants of statutory authority to impose sanctions. *See American Bus Ass'n v. Slater*, 231 F.3d 1, 6 (D.C. Cir. 2000). In this case, the Companies question whether the Commission has jurisdiction to regulate telemarketing as a common carrier practice under §

201(b) of the Act. *See* Harold Furchtgott-Roth & Bryan Tramont, *Commission on the Verge of a Jurisdictional Breakdown: The FCC and Its Quest to Regulate Advertising*, 8 Comm. L. Conspectus 219, 225-29 (2000). Even assuming it has such jurisdiction, the Commission clearly has no express authority to impose the sanctions it contemplates in this case.

I. The Commission Lacks Jurisdiction To Revoke § 214 Certification

Congress has not expressly authorized the Commission to revoke the operating authority "bestowed" on the Companies pursuant to § 214 of the Act. *Order*, at 13 (¶ 25). And the Commission's claim that it is empowered by § 214 to revoke "blanket" authorizations is unavailing. *See Order*, at 3, 25 (¶¶ 3, 25).

Section 214(a) authorizes the Commission to regulate entry into, and exit from, the "common carrier communications field." *MCI Telecommunications Corp v. FCC,* 561 F.2d 365, 375 (D.C. Cir.), *cert.denied*, 434 U.S. 1040 (1977). With respect to market entry, § 214 provides that no carrier shall construct, extend or acquire a line unless it obtains certification from the Commission that such entry would be in the public interest. *See* 47 U.S.C. § 214(a). The primary purpose of § 214(a) "is prevention of unnecessary duplication of *facilities*, not regulation of services." *MCI*, 561 F.2d at 375 (emphasis in original). *See Implementation of § 402(b)(2)(A) of the Telecommunications Act of 1996*, 14 FCC Rcd 11364,11366 (1999) (§ 214(a) entry requirements enacted to prevent "useless duplication of facilities") ("*Streamlining Order*").

The services and practices of carriers are governed by §§ 201 - 205 of the Act, not by § 214. Only the Commission's authority to attach terms and conditions to a certificate under § 214(c) grants it power over individual carriers. *See* 47 U.S.C. § 214(c). However, § 214(c) gives the Commission

no enforcement authority beyond filing suit to have any unlawful "construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service . . . enjoined by any court of competent jurisdiction." 47 U.S.C. § 214(c).

With respect to market exit, § 214(a) provides that a carrier must obtain Commission certification before it can "discontinue, reduce or impair service to a community." 47 U.S.C. § 214(a). Exit certification marks the limits of the Commission's § 214 authority with respect to the termination of a carrier's service. Congress gave the Commission no § 214 authority whatsoever to revoke a carrier's § 214 certificate.[2/] Indeed, the Commission correctly read § 214 to concern "facility authorizations, not revocations." *Pass Word, Inc.*, 86 FCC 2d 437, 443 (1981), *aff'd, Pass Word, Inc. v. FCC*, 673 F.2d 1363 (D.C. Cir.), *cert denied*, 459 U.S. 840 (1982).

The Commission was not expressly authorized to revoke § 214 certificates when it actually granted such certificates. Congress gave the Commission no more power after it created "blanket authority regulation." *Streamlining Order,* 14 FCC Rcd at 11372. Surely, the Commission did not become empowered to revoke "blanket" § 214 certifications by virtue of its decision not to enforce § 214.

[2/] As noted above, § 214 has an explicit enforcement mechanism. And it is not revocation. *See* 47 U.S.C. § 214(c). Congress expressly authorized revocation with respect to Title III licenses. *See id.* § 312(a). As a court recently explained in holding that the Commission exceeded its jurisdiction in a slamming case, "It is a general principle of statutory construction that when one statutory section includes particular language that is omitted in another section of the same Act, it is presumed that Congress acted intentionally and purposely." *AT&T Corp. v. FCC,* 323 F.3d 1081, 1087 (D.C. Cir. 2003) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 439-40 (2002)). Because Congress declined to provide for revocation either in § 214 or elsewhere in Title II, the presumption is that Congress left the Commission without jurisdiction to revoke the Companies' blanket § 214 certification.

The Commission also claims § 4(i) of the Act as its revocation authority. *See Order*, at 13 (¶ 25). Section 4(i) merely permits the Commission to "issue such orders, not inconsistent with [the Act,] as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Section 4(i) is not an independent grant of jurisdiction; it confers on the Commission only such power as is ancillary to its specific statutory responsibilities. *California* v. *FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990). Whatever the limits of § 4(i), it does not expressly authorize the Commission to revoke a carrier's § 214 authority, or to impose any other sanction for a carrier's wrongful conduct. Because of that, APA § 558(b) bars the Commission from invoking § 4(i) as its authority to sanction the Companies. *See American Bus*, 231 F.3d at 6-7.

We recognize that the *Order* does not represent the first time the Commission has claimed the authority to revoke blanket § 214 authorizations.[3/] As was the case here, the Commission has never been able to point to a statutory provision that expressly empowers it to revoke a carrier's Title II operating authority. Without an express delegation of power from Congress, the Commission's professions of authority are to no avail. The Commission simply "may not confer upon itself power." *Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986). *See Sterling Manhattan Cable Television, Inc.*, 38 FCC 2d 1149, 1156 (1973) ("Our jurisdiction and power can be no greater than that which Congress has conferred upon us").

The Commission is without authority to launch a revocation case against the Companies. Even more so, there is no legal or logical basis on which to proceed against the principals of the

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[3/] *See Rules and Policies on Foreign Participation in U.S. Telecommunications Market,* 15 FCC Rcd 18158, 18172 (2000); *GTE Corp. and Bell Atlantic Corp.*, 15 FCC Rcd 14032, 14147 (2000); *Streamlining Order*, 14 FCC Rcd at 11372-74; *CCN, Inc.*, 13 FCC Rcd 13599, 13607 (1998).

Companies inasmuch as they hold no authorizations for the Commission to revoke. The Commission must vacate the show cause order it issued at paragraph 25 of the *Order* and delete issue (b) from paragraph 27.

II. The Commission Lacks Authority To Proceed Under § 312(b) Of The Act

The Commission also looked to Title III of the Act for a remedy for the Companies' alleged Title II violation. It issued the Companies' principals a show cause order under § 312(b) of the Act. *See Order*, at 14 (¶ 26). The show cause order cannot stand irrespective of the Commission's authority to sanction an alleged § 201(b) violation under Title III.

Section 312(b) of the Act "provides that where a person has violated the Act or the Rules, the Commission may order that person to cease and desist from such action." *Terrance R. Noonan*, 67 FCC 2d 62, 64 (1977). *See United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 179-80 (1968). Clearly, § 312(b) only "authorizes the Commission to prohibit unlawful acts." *Noonan*, 67 FCC 2d at 65. Here, the Companies' principals face some form of prohibitory order (or preventive injunction) barring them from engaging in conduct that is entirely lawful - - providing interstate common carrier service without prior Commission consent. *See Order*, at 14 (¶ 27(c)). [4/] Section 312(b) does not authorize the imposition of such a prior restraint on the Companies or their principals.

The conduct that is alleged to violate § 201(b), and is subject to being enjoined, is the Companies' purported unjust and unreasonable telemarketing practices. Congress has spoken directly to the Commission's authority to order a carrier to cease and desist from engaging in an unjust and

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[4/] Parties no longer need prior Commission authority to provide domestic, interstate common carrier services (provided they do not use radio frequencies). *See* 47 C.F.R. § 63.01(a).

unreasonable practice. Section 205(a) of the Act provides:

> Whenever, after full opportunity for hearing, . . . under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any . . . practice of any carrier . . . is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe . . . what . . . practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier . . . shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist . . .and shall conform to and observe the . . . practice so prescribed.[5/]

If the Commission elects to remedy a suspected § 201(b) violation by the issuance of a cease and desist order, APA § 558(b) mandates that the Commission adhere to the cease and desist procedure authorized for use specifically against common carriers by § 205 of the Act. *See* 5 U.S.C. § 558(b). So too does the Act. *See* 47 U.S.C. § 151 (the Commission "shall execute and enforce the provisions of this chapter"). When it enforces the Title II obligations of common carriers, the Commission must follow the procedures Congress "carefully crafted" in §§ 201 - 205 of the Act. *AT&T Co. v. FCC*, 836 F.2d 1386, 1394 (D.C. Cir. 1988) (Starr, J., concurring). *See Illinois Bell Tel. Co. v. FCC*, 966 F.2d 1478, 1481-83 (D.C. Cir. 1992) (Commission cannot "blend or pick and choose at will" its authority under §§ 204 and 205); *AT&T Co. v. FCC*, 487 F.2d 864, 880 (2d Cir. 1973) (Commission is not free to "circumvent or ignore" §§ 203-205).

A cease and desist order to prescribe compliance with § 201(b) operates prospectively consistent with the rule against retroactivity embodied in §§ 204 and 205 of the Act. *See Illinois Bell*, 966 F.2d at1481-82. Thus, if a carrier violates the cease and desist order, the Commission may

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[5/] 47 U.S.C. § 405(a).

invoke the "remedial mechanism crafted specifically for such violations" in § 205(b). *AT&T*, 836 F.2d at 1393 (Starr, J., concurring). As the penalty, § 205(b) specifies, "Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey" a cease and desist order made under § 205(a) "shall forfeit to the United States the sum of $12,000 for each offense." 47 U.S.C. § 205(b).

As this case demonstrates, § 205 supposes a prospective remedy for good reason. *See Illinois Bell*, 966 F.2d at1482. The Commission has not exercised its § 201(b) authority to prescribe rules defining unjust and unreasonable telemarketing practices by common carriers. Hence, the Companies are not charged with a rule violation. But without telemarketing rules, the Companies were not afforded the "advance, clear and adequate notice" of the telemarketing practices prohibited by § 201(b) that due process requires as a prerequisite to the imposition of a sanction. *Mercury PCS II, LLC*, 13 FCC Rcd 23755, 23759 n.17 (1998). *See High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 607 (D.C. Cir. 2002). That due process violation would be avoided if the Commission abides by the cease and desist procedure required by § 205(a).

Under § 205(a), if it finds against the Companies after a full hearing, the Commission can prescribe what "just, fair, and reasonable" telemarketing practices must "be thereafter followed." 47 U.S.C. § 205(a). It can order the Companies to "cease and desist" from the telemarketing practices prohibited by § 201(b) and to "conform to and observe" the prescribed practices. *Id.* Only if the Companies, or its officers, representatives, or agents, knowingly fail or neglect to obey the cease and desist order can they be subject to a forfeiture. *See id.* § 205(b). That process would fully conform both to the Commission's statutory authority and the prior notice requirement of due process.

Because it is without authority under § 312(b) to order the Companies to show cause, the Commission should amend the jurisdictional statement in paragraph 26 of the *Order* to specify § 205(a) as its statutory authority. *See Westel Samoa*, 13 FCC Rcd at 6345, 6348. Since the Commission can only order a carrier to cease and desist from violating a provision of the Act, *see* 47 U.S.C. § 205(a), issue (c) must be amended to read:

> to determine whether, in light of all the foregoing, NOS Communications, Inc., Affinity Network Incorporated, and NOSVA Limited Partnership should be ordered to cease and desist from engaging in any misleading and continuous telemarketing practices.

III. The Commission Lacks Authority To Enjoin The Companies' Principals

The Commission did not identify the principals of the Companies whom it ordered to show cause and whose conduct it seeks to restrain. *See Order*, at 13,14 (¶¶25, 26, 27(c)). Nor did it define the term "principal." And the Commission articulated no legal theory under which it has jurisdiction to enjoin the activities, and infringe the individual rights, of the principals of common carriers.

We need not address the due process interests implicated by the Commission's action for they are legion. Suffice it to say that Congress specified the sanction that can be imposed on an officer, representative or agent of a carrier that has engaged in an adjudicated violation of § 201(b). *See* 47 U.S.C. §§ 205(b). No provision of the Act expressly empowers the Commission to enjoin a principal of a Title II carrier from pursuing a career in telecommunications.

IV. The Notice Of Potential Liability For Forfeiture Must Be Vacated

The Commission afforded the Companies notice under § 503(b)(A) of the Act of a potential forfeiture liability if they are found to have willfully or repeatedly violated "any provision" of the Act or the Rules cited in the *Order*. *See Order*, at 15 (¶¶ 30, 32). The Commission cited no rule and

only § 201(b) of the Act. However, a forfeiture penalty cannot be imposed for "any conduct which is subject to forfeiture" under Title II of the Act. 47 U.S.C. § 503(b)(1). Unjust and unreasonable telemarketing practices that violate § 201(b) - - if telemarketing is subject to § 201(b) - - are subject to forfeiture under, and only in accordance with, § 205(b) of the Act. *See supra* pp. 8-10. Consequently, no forfeiture penalty can be assessed in this case. *See* 47 U.S.C. § 503(b)(1); 47 C.F.R. § 1.80(a). The *Order* should be further amended to delete paragraphs 30 and 32.

CONCLUSION

For all the foregoing reasons, the Companies respectfully request that the Commission reconsider and amend its *Order* as requested herein.

Respectfully submitted,

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May 7, 2003

CERTIFICATE OF SERVICE

I, Jennifer C. Colman, do hereby certify that on this 7th day of May, 2003, a copy of the foregoing "Petition for Reconsideration" was mailed by certified U.S. first class mail, postage pre-paid (except where noted) to the parties listed below:

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